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Judicial Deference to Arbitration Awards in Grievances involving Discrimination

John R. Webb

NOTES

JUDICIAL DEFERENCE TO ARBITRATION AWARDS IN GRIEVANCES INVOLVING DISCRIMINATION

I. INTRODUCTION

Disputes over discriminatory employment practices have traditionally been settled privately between the contracting parties, the employer and the employee, although the latter could seek the support of his bargaining representative. In the United States, however, such disputes must be viewed against a background of a national labor policy which, because of the deleterious effect on the public interest of labor unrest, places a premium on statutory and judicial regulation of the employment relationship. The impact of Title VII of the Civil Rights Act of 1964[1] exemplifies the latent conflict between statutory regulation of labor disputes and their settlement through private mechanisms.

Title VII provides the employee who alleges that he has been victimized by discrimination based on race, color, religion, sex or national origin with a remedy against his employer that operates entirely apart from the grievance settlement mechanisms established by the collective bargaining agreement. A party who wishes to invoke Title VII must file a complaint with the Equal Employment Opportunity Commission (EEOC) which alleges a violation of the rights guaranteed therein. Where the state in which the charge is filed has legislation prohibiting discriminatory employment practices, the EEOC may not act until either the state proceedings have terminated or sixty days have elapsed since their commencement; where no such legislation exists, the charge must be filed with the EEOC within ninety days of the allegedly discriminatory action.

If the investigation by the EEOC discloses "reasonable cause" to accept the veracity of the charge, it will first attempt to eliminate the discriminatory practice through conciliaion and conference.[2] Should the EEOC be unable to secure voluntary compliance,

1. Civil Rights Act of 1964 §§ 701-16(c), 42 U.S.C. §§ 2000e-2000e-15 (1970), *as amended*, Pub. L. No. 92-261, § 4, 86 Stat. 104 (March 24, 1972).
2. Civil Rights Act of 1964, Publ. No. 88-352, § 706(a), 78 Stat. 259.

it may, within thirty days, bring a civil action against any respondent who is not a government, governmental agency, or political subdivision thereof. If, after thirty days, the EEOC has initiated no action, the aggrieved party has ninety days in which to sue on his own behalf.[3] Upon finding a violation of Title VII, a federal district court may enjoin the respondent from engaging in the unlawful practice and order appropriate affirmative relief, such as reinstatement with back pay.[4]

Despite the existence of this federal remedy, the employee may seek to redress a discriminatory employment practice through the grievance adjustment mechanism that has been established by the collective bargaining agreement. In the vast majority of contracts, such a mechanism provides for arbitration as the final step. If, however, arbitration produces a decision which is unsatisfactory to the employee, he may attempt to relitigate substantially similar issues in federal court via an EEOC complaint. In such a case, controversy surrounds the extent to which the arbitral and judicial processes are duplicative. Nonetheless, the potential for relitigation cannot be denied.

The principle purpose of this note is to consider whether the employee who has submitted to arbitration an employment practice that is violative of Title VII, should be estopped from thereafter seeking relief from the same practice in federal court. The propriety of an arbitrator relying on federal law — specifically Title VII — which has not been expressly incorporated into the collective bargaining agreement will be examined. Finally, criteria palatable to both arbitrators and judges will be suggested against which the arbitration of a discriminatory employment practice can be tested to ascertain whether or not the grievance has been so fully heard as to preclude access to the federal courts.

II. JUDICIAL PRONOUNCEMENTS ON ELECTION OF REMEDIES

Based on the decisions of the United States Courts of Appeals,[5] and in the absence of a clear expression by the Supreme Court,[6]

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3. Act of March 24, 1972, Pub. L. No. 92-261, § 706 (f)(1), 86 Stat. 105, *amending* 42 U.S.C. §§ 2000e-2000e-15 (1970). The complainant is permitted to intervene in the suit by the EEOC. Should he sue on his own behalf, the court may, within its discretion, appoint an attorney to represent him and authorize the action to be commenced without the payment of security or fees.

4. *Id.* at § 706(g).

5. Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970); *contra* Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd* 402 U.S. 689 (1971). *See* Comment, Labor Arbitration and Title VII of the Civil Rights Act of 1964, 10 DUQ. L. REV. 461 (1972).

6. The *Dewey* case was affirmed by an equally divided court, Dewey v. Reynolds Metal Co., 402 U.S. 689 (1971).

the majority view is that submission of a discriminatory employment practice to arbiration does not constitute a binding election of remedies or an estoppel which would preclude the grievant from seeking relief in federal court under Title VII.

In *Bowe v. Colgate-Palmolive Co.*[7] the plaintiffs, present or former female employees of defendant company, brought suit under Title VII alleging discriminatory lay-offs under a segregated seniority system based on sex. Prior to trial, the district court required the plaintiffs to elect whether they would proceed before it or submit their grievance to arbitration under the prevailing collective bargaining agreement. The court of appeals found this requirement to be erroneous.

The concurrent jurisdiction between the arbitrator and the court was conceded. The court went on the find, however, that:

> The analogy to labor disputes involving concurrent jurisdiction of the N.L.R.B. and the arbitration process is not merely compelling, we hold it conclusive.[8]

Although the court agreed that permitting relitigation saddled the defendant employer with the burden of defending in multiple forums, it discovered a more weighty countervailing policy in the distinctions between arbitration and judicial proceedings:

> [T]he arbitrator may consider himself bound to apply the contract and not give the types of remedy which are available under the statute. Conversely, an action in court may not be able to delve into all the ramifications of the contract nor afford some types of relief available through arbitration, *e.g.*, back pay prior to the date of the statute.[9]

Moreover, the court pointed out that in a Title VII action the charging party acted under the mantle of the sovereign as a private attorney general. Hence, it contended, the trial court bore a responsibility in the public interest to resolve the dispute regardless of the position of the individual plaintiff. However, the court limited its holding, acknowledging that dual relief would be inappropriate where:

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7. Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

8. *Id.* at 714. The authorities which the court cites generally state that the arbitrator cannot deprive the Board of its statutory jurisdiction. *See, e.g.*, Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964).

9. Bowe v. Colgate Palmolive Co., 416 F.2d 711, 715 (7th Cir. 1969). As the enactment of Title VII becomes more distant, an award of back pay prior to the date of the statute seems increasingly remote.

> [E]lection of remedy was made after adjudication so as to preclude duplicate relief which would result in an unjust enrichment or windfall. . . .[10]

After a similar, but more detailed analysis, the Court of Appeals for the Fifth Circuit reached the same result in *Hutchings v. United States Industries, Inc.*[11] Hutchings, a black, brought an action under Title VII wherein he alleged that his employer had twice refused to promote him because of his race. The district court granted the company's motion for a summary judgment. It reasoned that by pursuing the alleged discriminatory denial of promotion to final determination through the plant's grievance-arbitration procedures, Hutchings had made a binding election of remedies.

In articulating the basis for its reversal, the court started from the premise that since Title VII was silent as to the role of grievance arbitration in the settlement of discriminatory employment practices, "the task of discerning 'legislative intent' rests upon the sound application of judicial principles and precedents."[12] The court noted that, insofar as the EEOC was limited to seeking voluntary compliance, the federal courts alone held the true enforcement power, and were vested by Title VII with broad discretion to frame the appropriate relief.[13] The pronouncements of the *Bowe* court were echoed as to both the distinctive rights and remedies of arbitration, and the duty of the trial court to reach beyond the demands of the private litigant to vindicate the policies of Title VII.

The court's principal concern was that the limitations which the parties' agreement placed on the role of the arbitrator precluded a full and fair hearing on the discrimination grievance. It adopted the language of the United States Supreme Court in *United Steelworkers of America v. Enterprise Wheel Car Corp.*[14]

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbi-

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10. *Id.*
11. Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970).
12. *Id.* at 311.
13. *Id.* at 311-13. Before the 1972 amendments, the EEOC could not bring an action on the complainant's behalf. However, the amendments do not defeat the validity of the court's observations. Even though currently the EEOC may bring an action, it still has no enforcement power until it has prevailed in a judicial proceeding.
14. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

> trator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[15]

The court believed that even where the contract contained an anti-discrimination clause, the arbitrator would not give the types of remedies available under Title VII. It observed that because a union member would naturally first seek to vindicate his rights under the contract, he should not be penalized through the doctrine of election of remedies or res judicata.[16] In conclusion, the court stated:

> We do not mean to imply that employer obligations having their origin in Title VII are not to be incorporated into the arbitral process. . . . But the arbitrator's determination under the contract has no effect upon the court's *power* to adjudicate a violation of Title VII rights.[17]

The court in *Hutchings* also acknowledged the inapplicability of its holding to a situation where duplicate relief would result in unjust enrichment or a windfall. Its most significant addition to the analysis contained in *Bowe* concerned the effect of deficiencies in the record on the decision to defer to the arbitrator's award:

> The arbitrator, for example, did not purport to apply [Title VII] rights to the problem submitted (it does not appear whether the issue was raised), and the record does not show does not show what evidence he considered or the procedures that were followed. In view of the state of this record, we leave for the future the question whether a procedure similar to that applied by the Labor Board in deferring to arbitration awards when certain standards are met might properly be adopted in Title VII cases.[18]

The significance of this qualification, as a basis for reconciling the split among the circuits, especially when viewed in light of the Sixth Circuit's retreat from the position that arbitration precludes further proceedings, cannot be exaggerated. Regretably, the court supplied no authority from which such standards could be directly inferred.

Several lower federal courts have adopted the view that arbitration does not preclude a subsequent Title VII suit based on the

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15. *Id.* at 597.
16. Hutchings v. United States Indus., Inc., 428 F.2d 303, 313 (7th Cir. 1970). The court acknowledged that the award could be considered as evidence.
17. Hutchings v. United States Indus., Inc., 428 F.2d 303, 313 (7th Cir. 1970), *citing* Local No. 12 v. Cameron Iron Works, 257 F.2d 467 (5th Cir. 1958), wherein it was held that arbitration could not erode the statutory jurisdiction of the Board.
18. Hutchings v. United States Indus., Inc., 428 F.2d 303, 314 n.10 (7th Cir. 1970). *Compare* Newman v. Avco Corp. Aerospace St. Div., 451 F.2d 743 (6th Cir. 1971).

same transaction. For example, in *Page v. Curtiss-Wright Corp.*[19] the court concluded that the arbitrator had limited himself to a narrower issue than that which was before it. *Mack v. General Electric Co.*[20] involved a grievance which had been settled before arbitration. This less formal termination was held not to prevent additional relief in federal court. The court in *Salinas v. G. W. Murphy Industries, Inc.*[21] pointed out two deficiencies in the arbitration process: first, that it lacked guarantees of procedural due process; and, second, that the union might have countervailing interests to those of the grievant, especially where he is a member of a racial minority.[22] These factors were found to negate the function of arbitration as an adequate hearing of the discrimination grievance.

The analyses of two other federal district courts involved greater sophistication. In *Lopez v. State Foundry & Mach., Inc.*,[23] settlement of the discrimination claim under state law was held not to bar a federal action on the same ground because the state law failed to allow for an award of back pay. The court commented:

> Title VII of the 1964 Civil Rights Act affimatively encourages voluntary settlement or settlement under state law. It would be inappropriate to hold that the pursuit of state remedies or the settlement of state law claims would result in a waiver of federal claims per se, for such a rule could only chill what the Act ends to encourage.[24]

It should be noted that the court in *Hutchings* seemed hardpressed to argue around Title VII's endorsement or private dispute settlement. By a parity of reasoning, the discussion in *Lopez* suggests that deference to arbitration awards may deter full utilization of that process.

In *Oubichon v. North American Rockwell Corp.*[25] the complainant had been awarded back pay with removal of warnings from his record at arbitration. The court found that the limitation in the *Bowe* opinion to situations which did not involve duplicative relief compelled dismissal of the Title VII action for mootness. It stated:

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19. Page v. Curtiss-Wright Corp., 332 F. Supp. 1060 (D.N.J. 1971).
20. Mack v. General Electric Co., 329 F. Supp. 72, 78 (E.D. Pa. 1971).
21. Salinas v. G. W. Murphy Indus., Inc., 338 F. Supp. 1382 (S.D. Tex. 1972).
22. *See* Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109; Vaca v. Sipes, 386 U.S. 171 (1967).
23. Lopez v. State Foundry & Mach., Inc., 336 F. Supp. 34 (E.D. Wisc. 1972).
24. *Id.* at 37.
25. Oubichon v. North American Rockwell Corp., 325 F. Supp. 1033 (C.D. Cal. 1970).

> The settlement of the grievances accepted by the plaintiff provided the plaintiff with all the relief to which he could be considered entitled ... .[26]

This rationale would permit a defendant to prevail through summary judgment by showing that the grievant had been awarded adequate relief in arbitration. Notably, by focusing on the result of arbitration, the moving party would not have to assert that the mere submission of the grievance to arbitration precluded subsequent court action.

Although the minority position, that submission of a discriminatory employment practice to arbitration estops the grievant from subsequently filing a Title VII suit, is best represented by the Sixth Circuit's holding in *Dewey v. Reynolds Metals Company*,[27] brief mention must be made of unappealed pre-*Dewey* district court decisions. In *Washington v. Aerojet General Corp.*,[28] after the union and the company, with the concurrence of the plaintiff, had agreed to reduce a one month disciplinary lay-off to nine days, the plaintiff brought a Title VII action. The company moved to dismiss on the theory that the private settlement constituted a binding election of remedies. While granting the motion, the court nevertheless expressed distaste for the requirement of an *ad initio* election of forum which had been articulated by the district court in the *Bowe* case:

> Because of the time limits under the civil rights legislation, the charging party will often be forced to initiate civil rights proceedings with the State or Federal agency or the Federal courts at precisely the same time that he is seeking to enforce his contractual rights under the collective bargaring agreement.[29]

Rather, the binding election rule was applied at the point where the "litigant has pursued his remedies in one forum to decision, be it by settlement, the decision of an arbitrator, or the decision of a judge."[30]

Similarly, in *Edwards v. North American Rockwell Corp.*,[31] the plaintiff had cashed a check which represented the amount of a settlement for loss of pay during his suspension. By emphasizing that acceptance of the settlement constituted a binding election,

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26. *Id.* at 1038.
27. Dewey v. Reynold Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd* 402 U.S. 689 (1971).
28. Washington v. Aerojet Gen. Corp., 282 F. Supp. 517 (C.D. Cal. 1968).
29. *Id.* at 522.
30. *Id.* at 523.
31. Edwards v. North American Rockwell Corp., 291 F. Supp. 199 (C.D. Cal. 1968).

the court followed *Washington* in departing from the *ad initio* election rule. Some criticism of the minority view has focused on the concept of an *ad initio* binding election which is arguably objectionable because the employee may initiate a grievance before he becomes aware of his Title VII rights. Hence, despite the subsequent litigation at the appellate court level, these decisions remain significant in that they demonstrate a minority view based on the finality of prior settlement rather than an *ad initio* election.

The *Dewey* case involved religious, rather than racial, discrimnation. In a Title VII suit seeking back pay and reinstatement, the complainant alleged that his discharge for refusal to work overtime on the Sabbath constituted an unlawful constraint on his religious beliefs. In the arbitration of the grievance relief was denied. The district court refused to grant Reynolds' motion to dismiss, which was based, *inter alia*, on election of remedies.

The Sixth Circuit's reversal of the lower court was predicated primarily on the Supreme Court's elevation of arbitration to a position of primacy in national labor policy. The court cited the *United Steelworkers* trilogy[32] for the proposition that, had the arbitrator's award favored Dewey, it would have been, "final, binding and conclusive on Reynolds."[33] The court ruled that, the parties had selected a mutually agreeable arbitrator, he should have the right to finally determine the grievance. It stated:

> Any other construction would bring about the result present in the instant case, namely, that the employer, but not the employee, is bound by arbitration.
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> This result could sound the death knell to arbitration. . . . . Employers would not be inclined to agree to arbitration clauses in collective bargaining agreements if they provided only a one way street, *i.e.*, that the awards are binding on them but not on their employees.[34]

In denying a petition for rehearing, the court elaborated upon this theme by referring to *Boys Market, Inc. v. Retail Clerks Union.*[35] The court pointedly stated that the rule pronounced in the *Hutchings* case was inconsistent with the spirit of *Boys Market.* The court observed that in Boys Market the Supreme Court permitted no

32. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

33. Dewey v. Reynolds Metal Co., 429 F.2d 324, 331 (6th Cir. 1970), *aff'd* 402 U.S. 689 (1971).

34. *Id.* at 332.

35. Boys Market, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970).

strike clauses, which had been exchanged for mandatory arbitration clauses, to be specifically enforced because the previous rule, allowing enforcement of the arbitration clause only by the union, was found to deter the use of arbitration. In contrasting the facts before it with those in *Boys Market*, where the strike had preceded even an attempt to arbitrate, the court commented:

> Our case is even stronger than *Boys Market* because the grievance here was submitted to arbitration and the arbitrator made an award which was final, binding and conclusive on the parties.[36]

In assessing the precedential weight of *Dewey*, two points merit particular mention. First, the court discussed the effect of the arbitration as a bar only after a lengthy attack on the merits of the district court's conclusion that the discharge constituted religious discrimination. Second, the court never characterized its ruling as based on an election of remedies, nor did it mention the treatment of that doctrine by the Seventh Circuit in the *Bowe* case.

The significance of the rule pronounced in *Dewey* arises not so much from its genesis as from its evolution. In *Spann v. Kaywood Division, Joanna Western Mills Co.*,[37] plaintiff, a black, had been discharged because he had asked two white, female coworkers for dates. Despite having been reinstated by the arbitrator, he brought a Title VII suit to recover back pay, which the arbitrator had declined to award.

Spann sought to avoid the *Dewey* rule on several grounds. The court found that the facts of the case did not support the contention that the union had failed to pursue the racial issue in arbitration. Alternatively, the grievant asserted that under *Glover v. St. Louis-San Francisco Ry. Co.*[38] and *Vaca v. Sipes*[39] he was not obliged to seek settlement through arbitration. Both cases were distinguished as involving situations where the employee had discovered, or had sound reason to suspect, that pursuit of contractual remedies would be futile. Finally, Spann asserted that he had not really pursued his remedy on the racial discrimination issue because the issue was outside the jurisdiction of the arbitrator. The court found that the arbitrator had the requisite jurisdiction based on an equal pay for equal work clause in the agree-

36. Dewey v. Reynolds Metal Co., 429 F.2d 324, 327 (6th Cir. 1970), *aff'd* 402 U.S. 689 (1971).
37. Spann v. Kaywood Div., Joanna Western Mills Co., 446 F.2d 120 (6th Cir. (1971).
38. Glover v. St. Louis-San Francisco Ry. Co., 393 U.S. 324 (1969).
39. Vaca v. Sipes, 386 U.S. 171 (1967).

ment, and added, "[c]learly both parties to the arbitration itself believed this to be the case. . . ."[40] In conclusion, it gave voice to a cautionary note:

> We hold only that where all issues are presented to bona fide arbitration and no other refuge is sought until that arbitration is totally complete, *Dewey* precludes judicial cognizance of the complaint.[41]

Newman v. Avco Corp.-Aerospace St. Div.[42] again presented the Sixth Circuit with an opportunity to reconsider the *Dewey* case. There, plaintiff, a black employee with fourteen years tenure, was transferred to a new position as a stove lifter when his department was reduced. He was discharged for inefficiency after a short period on the new job. Newman filed a grievance:

> [C]ontend[ing] that the past practices of the company in failing to give blacks adequate training had caused his inability to perform jobs other than Stove Lifter, to which he might have been transfered when his department was reduced.[43]

When the union informed Newman that it would not allege racial discrimination in the firing, he retained counsel to present the racial points to the arbitrator. The arbitration award was adverse to Newman on all points. In his subsequent Title VII suit, the district court granted Avco's motion for a summary judgment on the ground that the arbitration constituted a binding election of remedies.

Before discussing the facts of the case, the court of appeals at least clarified, if it did not substantially reformulate, its holding in *Dewey*. The court first expressed general distaste for the election of remedies rule. It commented that private parties by private contract could not deprive a federal court of its statutory jurisdiction and that, furthermore, although Congress was familiar with the arbitration of labor disputes, no language in Title VII supported election of remedies. The court then declared, ". . . we do not read *Dewey* as based upon the doctrine of election of remedies."[44] By way of explanation the court pointed out that the doctrine applied, "only where conflicting and inconsistent remedies are sought on the basis of conflicting and inconsistent rights."[45] It then reasoned that the doctrine could not have been applied in *Dewey* because

40. Spann v. Kaywood Div., Joanna Western Mills Co., 446 F.2d 120, 123 (6th Cir. 1971).
41. *Id.*
42. Newman v. Arco Corp.-Aerospace St. Div., 451 F.2d 743 (6th Cir. 1971).
43. *Id.* at 745.
44. *Id.* at 746.
45. *Id.* at 746 n.1. The court went on to characterize the election doctrine as "harsh"

not only had the same facts been presented to both the court and the arbitrator, but the remedies sought had been complementary. From this analysis it concluded:

> [I]t seems apparent that the second ground relied on for the decision in *Dewey* was the doctrine of estoppel. This equitable doctrine holds that where the parties have agreed to resolve their grievances before 1) a fair and impartial tribunal 2) which had *power to decide them*, a District Court should defer to the fact finding thus accomplished.[46]

In applying this twofold test to the facts in *Newman*, the court first observed that because under the collective bargaining agreement failure to pursue each step of the grievance machinery to final conclusion rendered the discharge final, the submission of the discharge to arbitration had not been a voluntary choice. The court also noted that the allegation of a pattern of racial discrimination participated in by both company and union had been entirely absent in *Dewey*. The court concluded that the first condition for estoppel had not been met, stating:

> This totality of circumstances appears to represent a fundamental attack upon the fairness and impartiality of the arbitration proceeding and specifically to represent an allegation of bad faith against defendant union.[47]

Furthermore, the court felt that grave doubt existed as to the arbitrator's authority to finally decide a racial discrimination claim. It noted both the absence of an anti-discrimination clause in the contract and a narrow provision restricting the jurisdiction of the arbitrator to "questions involving the interpretation, application or alleged violation"[48] of the terms of the agreement. The arbitrator was also prohibited from adding to, subtracting from or changing any of the agreement's terms.[49] Hence, the court stated:

> In short, major aspects of this District Court complaint were either not submitted to arbitration or were beyond the arbitrator's power of decision. To such issues plainly neither the doctrine of res judicata nor collateral estoppel can apply.[50]

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and "largely obsolete", *citing* Friederichsen v. Renard, 247 U.S. 207, 213 (1918).

46. Newman v. Arco Corp.-Aerospace St. Div., 451 F.2d 743, 747 (6th Cir. 1971).
47. *Id.* at 748.
48. *Id.*
49. *Id.*
50. *Id.*

Although the presence of some of these contentions in the *Spann* case was conceded, it was distinguished because the grievant had accepted the award:

> Equitable considerations under the doctrine of estoppel argue strongly against allowing a litigant to make full use of arbitration up to the point of acceptance of the award (reinstatement to his job) and then permitting him to sue in another forum for the back pay which the arbitrator denied.[51]

The disposition of the Sixth Circuit toward the suggestion in *Hutchings* of a standard for judicial deference to arbitration paralleling that adopted by the NLRB for the same purpose is impossible to ascertain with certainty. However, it is submitted that not only has the Sixth Circuit expressed favorable sentiment toward the creation of such a standard, but its opinions permit the inference of the most crucial criterion around which a deference standard must be constructed.

In *Spann*, the court argues that the facts support deference to arbitration when viewed in light of a test suggested by the commentators.[52] More significantly, the court distinguishes *Dewey* from *Newman* on the basis of the full evidentiary record present in the former case, as contrasted with the skeletal record in the latter case which was decided by summary judgment. Within this context, the crux of *Newman* is not the union's bad faith, because insofar as the grievant was represented by his own attorney, he could not have been prejudiced thereby. Rather, the crucial point is the court's uncertainty as to the scope of the arbitrator's inquiry. The court notes that, in response to the grievant's allegation that an anglo who had performed as poorly had been transferred instead of fired, the arbitrator explained that the transfer had been requested by the foreman of the transferee department. The court then observed:

> This seems to ignore plaintiff's underlying position that he could not perform other chores well because due to racial discrimination, he had never been so trained, but in any event, the arbitration award denied relief to plaintiff.[53]

The court is thus uncertain as to whether the arbitrator failed to consider the grievance in the context of the company's alleged

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51. *Id.* at 749.

52. Spann v. Keywood Division, Joanna Western Mills Co., 446 F.2d 120, 123 n.3; *citing* Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under* TITLE VII, 69 MICH. L. REV. 599, 651 (1971).

53. Newman v. Arco Corp. St. Div., 451 F.2d 743, 745 (6th Cir. 1971).

history of racial discrimination, or considered the issue, but rejected it for a failure of proof. Such uncertainty must of necessity be determinative of a court's refusal to defer to an arbitration award. At first glance the election of remedies versus estoppel distinction may appear far removed from the policies of either civil rights or labor peace. However, the doctrine of estoppel is the more flexible. Hence, especially as it was applied in *Newman*, the latter doctrine provides the court with a rationale for investigating the arbitration procedure to determine the fullness of the hearing given to the Title VII issues.

Neither subsequent pronouncements by the Sixth Circuit nor the applications of its decisions by the district courts serves to elucidate the staus of the minority view. In *Thomas v. Phillip Carey Manufacturing Co.*,[54] the Sixth Circuit, with minimal discussion, held that the *Spann* case was controlling and expressly refused to overrule it. *Thomas* involved a suit for back pay which the arbitrator's award of reinstatement had not included, and was hence factually indistinguishable from *Spann*.

In *Alexander v. Gardner-Denver Co.*[55] the court, after quoting at length from both *Hutchings* and *Dewey*, found the superior argument to lie in the deleterious effect of multiple litigation upon arbitration. In holding that the employee was bound by the award, however, it observed that although no express reference to Title VII rights appeared therein, the affidavit of the grievant indicated that racial discrimination had been asserted before the arbitrator. In *Rios v. Reynolds Metals Co.*,[56] the court expressly attempted to synthesize the rule of *Dewey* with the *Hutchings* dictum on a standard for judicial deference. After discussing both cases, the court followed *Dewey*, but explained its conclusion by pointing out that the arbitrator had considered the same issues which were before the court. Hence, both of these cases may be read as establishing the existence of a record which demonstrates that the arbitrator considered Title VII rights as a condition precedent to deferring to his award.

III. ANALYSIS OF THE ARGUMENTS PRESENTED IN THE ELECTION OF REMEDY CASES

A. THE POLICY OF THE NLRB IN DEFERRING TO ARBITRATION

It will be remembered that the court in *Hutchings* explored the possibility of developing a standard for judicial deference to arbi-

54. Thomas x. Phillip Carey Mfg. Co., 346 F. Supp. 1012 (D. Colo. 1971).
55. Alexander v. Gardner-Denver Co., 466 F.2d 1209 (10th Cir. 1972).
56. Rios v. Reynolds Metals Co., 332 F. Supp. 1209 (S.D. Tex. 1971).

tration awards in Title VII cases similar to that developed by the Board to handle questions of concurrent jurisdiction with arbitrators. The Board first articulated such a standard in *Spielberg Manufacturing Co.*[57] In upholding an arbitration award which refused to reinstate grievants discharged for alleged strike misconduct, the Board stated:

> In summary, the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the act. In these circumstances we believe that the desireable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrator's award.[58]

Similarly, the Board in *International Harvester Co.*[59] deferred to an arbitration award which reinstated an employee discharged for falling behind in union dues as of the expiration of the contract, but with a resulting loss of seniority. The Board articulated the rationale for deference in these words:

> If complete effectuation of the federal policy is to be achieved, we firmly believe that the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as "part and parcel of the collective bargaining process itself. . . ."[60]

The Board stated that deference would be inappropriate only where "it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities," or where the award was "palpably wrong."[61] In closing it further bolstered an already weighty decision on behalf of deference; "To require more of the Board would mean substituting the Board's judgment for that of the arbitrator, thereby defeating the purposes of the Act. . . ."[62]

However, insofar as *International Harvester* constitutes the high water mark of Board deference to arbitration, the Board has since steadily retreated from that position. For example, in *Westinghouse*

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57. Spielberg Mfg. Co., 112 NLRB 1080 (1955).
58. *Id.* at 1082.
59. International Harvester Co., 138 NLRB 923 (1962), *aff'd* Ramsey v. NLRB, 327 F.2d 784 (7th Cir. 1964), *cert. denied* 377 U.S. 1003 (1964).
60. *Id.* at 927.
61. *Id.* at 927-29.
62. *Id.* at 929. This language echoes the position of the *Steelworkers* trilogy on the substitution of judicial for anhidral judgment.

Electric Corp.,[63] the Board did not defer to the arbitrator's settlement of a pretext discharge, stating:

> In this case apparently not all the evidence concerning [the Board's] standards was available to the arbitrator, . . . and his award reflects this deficiency. . . . Consequently, while we give some consideration to the award, we do not think it would effectuate statutory policy to defer to it entirely.[64]

More recent Board pronouncements on deference to arbitration demonstrate a continued erosion of the *Spielberg* doctrine as suggested in *Westinghouse*. Two pretext discharge cases in which the Board refused to defer to the arbitrator's award are illustrative. In *Montgomery Ward & Co.*[65] it was stated:

> [W]e are not satisfied that the statutory issue of discriminatory discharge had been either raised or resolved in the arbitration proceeding.[66]

In the same vein is *Yourga Trucking Inc.*[67] There the Board refused to accept the arbitrator's determination as conclusive because the party who alleged the award as a bar failed to meet the burden of proving that the alleged improper motive for the discharge had been argued during the arbitration.

Furthermore, it has been suggested that the rhetoric of deference was never thoroughly implemented in practice. A study of cases which presented the Board with the opportunity to defer to an arbitration award concluded:

> Even in the heydey of the deference doctrine between 1960 and 1964, the Board in fact deferred in only about 23 per cent of the cases in which the issue of arbitration was discussed. . . . Moreover, under the crucial test of what the Board has done in practice, the proportion of the cases in which the Board has deferred to arbitration has fallen from 23 per cent to 12 per cent of the cases in which the deference issue was discussed during the period 1965-67.[68]

In summary, the position of the NLRB on the question of deference to arbitration cannot be accepted as indicating an overall rule either demanding or prohibiting deference by the judiciary. As

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63. Westinghouse Electric Corp., 162 NLRB 768 (1967).
64. *Id.* at 771.
65. Montgomery Ward & Co., 195 NLRB No. 136, 79 LRRM 1505 (1972).
66. *Id.* at 1506.
67. Yourga Trucking Inc., 197 NLRB No. 130, 80 LRRM 1498 (1972).
68. Note, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191, 1193 (1968) (footnotes omitted).

the Board has acknowledged, arbitration is currently an integral part of national labor policy. However, the Board has also recognized other policies which would be frustrated if an arbitration award in which they might never have been considered were permitted to finally dispose of the controversy. In addition, an award that is repugnant to Title VII, even if it results from a full and fair hearing, should not stand.

It is submitted that the courts could best profit from the Board's treatment of the concurrent jurisdiction problem by developing a deference standard against which the facts of each case could be measured. The principal criterion would entail a demonstration that the arbitrator had been presented with evidence and arguments on the same issues that were being asserted before the alternative forum. The Board's policy of forcing the party who urges a prior adjudication as a bar to shoulder the burden of proving this issue seems appropriate for courts as well. Nor should the Board's concern with minimal procedural fairness be ignored.

Such a development would not be without support from the cases previously discussed. That the *Hutchings* dictum is directly in point cannot be disputed. More significantly, the Sixth Circuit applied just such criteria in refusing to find an estoppel in the *Newman* case. First, it expressed concern that the arbitrator had not considered the Title VII issue, or at least observed that the record did not permit the inference that he had. Second, the court weighed the misconduct of the bargaining agent, if not its overt collusion with the employer, and concluded that the fundamental fairness of the arbitration had been so badly eroded as to preclude the basis for an estoppel.

B. A COMPARISON OF THE REMEDIES AVAILABLE IN ARBITRATION WITH THOSE AVAILABLE IN A TITLE VII SUIT

In their opinions permitting the relitigation of a discrimination grievance under Title VII, despite its having been the subject of final arbitration, both the Fifth and Seventh Circuits asserted a disparity between the relief which an arbitrator could award and the relief which would be available from a federal district court in a suit brought under Title VII. According to Title VII:

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay.[69]

69. Act of March 24, 1972, Pub. L. No. 92-261, § 706 (g) 86 Stat. 105, *amending* 42 U.S.C. §§ 2000e-2000e-15 (1970).

The section goes on to allow for the deduction from back pay of interim earnings. Section 706(k) of the Act permits the court in its discretion to award attorney fees and costs. And, under the 1972 amendments, where the action is not brought by the EEOC, the court may appoint an attorney for the complainant. The power of a court to award affirmative relief in the form of hiring new employees is beyond the scope of this note, which assumes the grievant to be an employee. With that reservation, Title VII does not appear to contemplate the granting of any relief which would be outside the power of an arbitrator.

It is not disputed that an arbitrator may award damages in the form of back pay; because the employee must mitigate his loss, such damages are purely compensatory in nature.[70]

In upholding the power of the arbitrator to issue awards which involve a sanction not specifically provided for in the contract, courts have created a presumption in favor of such arbitral authority. For example, in reversing a district court which had ordered arbitration but had precluded the awarding of damages, the Fifth Circuit stated:

> [W]e find no such positive declaration as would exclude from the arbitrators the power to determine whether the award of back pay is or is not within the terms of the agreement, and if so, whether it is or is not an appropriate remedy. [71]

Similarly, in *Texas Gas Transmission Corp. v. International Chemical Workers Local* 187, *AFL-CIO*[72] plaintiff sought to vacate an award of back pay due employees whom the company had compelled to observe Memorial Day on May 29 rather than May 30. The court refused to grant relief, stating:

> [I]n order to deny the Arbitrator power to fashion an appropriate remedy for breach of the collective agreement, we must find clearly restrictive language negating the Arbitrator's power to fashion a remedy. . . .[73]

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70. ELKOURI, FRANK & EDNA, HOW ARBITRATION WORKS (1960) (citing numerous awards) [hereinafter cited as ELKOURI]. Arbitrator W. Willard Wirtz has emphasized that arbitrators have authority to award money damages even though the contract does not specifically provide such remedy. To restrict arbitrators to remedies specifically set forth in the contract would negate arbitration as a method of dispute settlement or would result in cluttering contracts with numerous liquidated damages provisions which would invite more trouble than they could prevent. *Id.* at 336-37.

71. International Assn. of Machinists v. Cameron Iron Works, Inc., 292 F.2d 112, 119 (5th Cir. 1961) (footnotes omitted), *cert. denied* 368 U.S. 926 (1961).

72. Texas Gas Transmission Corp. v. International Chem. Workers, Local 187, AFL-CIO, 200 F. Supp. 521 (W.D. La. 1961).

73. *Id.* at 528.

In contrast to compensatory damages, an arbitration award of punitive damages is clearly not favored.[74] However, in advocating the use of punitive damages, one arbitrator has argued:

> Public policy seeks the maintenance of labor peace, recognizing that industrial warfare is harmful to the greater public interest. Surely then, any tool or process that can be used to attain that goal is in the public interest, and its use should be encouraged.[75]

Although conceding that under current standards such an award would be improper absent contractual authorization, the commentator suggests the assessing of costs as a viable substitute. It should be noted that Title VII contains no provision authorizing punitive damages; furthermore, no case was found in which such damages were awarded.

The remedy of reinstatement, a command in the form of a mandatory injunction, is as common to arbitration as it is to Title VII suits. While arbitrators seldom characterize their awards as injunctions, it has been observed:

> In contrast to the infrequency of awards which prohibit a party from carrying out some specific future act, awards in the nature of "mandatory injunctions" which command a party to take some affirmative action, such as an award ordering the employer to reinstate an employee, are common in arbitration.[76]

Finally, the 1972 amendments to Title VII concerning the power of the court to appoint an attorney to represent the complainant have a parallel not in the power of the arbitrator, but in the grievance mechanism itself. It is the indisputable duty of the bargaining agent to represent the grievant. The consistency with which unions discharge this duty with regard to employees who belong to minority groups has not escaped challenge. However, as a justification for refusing to defer to arbitration, a court would be ill-advised to dispense with the effectiveness of the arbitration process because the grievant must depend on the good faith of the bargaining represent-

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74. ELKOURI, *supra* note 70, at 237.

75. S. Wolff, *The Power of the Arbitrator to Make Monetary Awards*, LABOR ARBITRATION-PERSPECTIVES AND PROBLEMS 176, 188 (1963). *Compare* Thorsen Mfg. Co., 44 LA 1049 (Koven, 1965) (no damages awarded where amount of overtime lost through erroneous work assignment was speculative because damages would be punitive in nature *with* Ralph Rogers & Co., 67-1 ARB P 8059 (Getman, 1966) (Company forced to pay costs of arbitration where its failure to clarify the basis for its decision to the union caused the grievance to be filed).

76. ELKOURI, *supra* note 70, at 171.

ative without an analysis of the facts of the controversy such as that which appears in the *Newman* case.

C. PRONOUNCEMENTS BY THE SUPREME COURT ON THE ROLE OF ARBITRATION IN NATIONAL LABOR POLICY

In the Labor-Management Relations Act Congress expressly stated that "final adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."[77] It was not until 1957, however, that the United States Supreme Court elevated arbitration to a position of primacy in national labor policy. Then, in *Textile Workers Union of America v. Lincoln Mills of Alabama*[78] the Court upheld a suit under section 301 of the Labor-Management Relations Act to enforce an agreement to arbitrate. The rise of arbitration at the hands of the Court continued through the *Steelworkers* trilogy,[79] wherein the Court ruled that a grievance, despite its apparently frivolous nature, was presumptively arbitrable. This line of cases culminated in *Boys Markets v. Retail Clerks Union, Local 770*.[80] There, the parties' agreement contained a no strike clause as the quid pro quo of a mandatory arbitration clause. Without submitting the dispute to arbitration, union members walked off ohe job. Despite the express prohibition against labor injunctions contained in section 7 of the Norris-LaGuardia Act, the Supreme Court upheld an injunction against the strike under section 301.

Language from the *Lincoln Mills* line of cases has been used by both sides of the controversy over judicial deference to the arbitration of discriminatory employment practices. The Sixth Circuit in *Dewey* relied on an analogy to *Boys Market*, where the Court felt compelled to provide management with a remedy against violation of the no strike clause because the union could enforce the agreement to arbitrate. By a parity of reasoning, it was felt that without judicial deference to arbitration, that process became a similarly impermissable one way street. On the other hand, the court in *Hutchings* quoted language from the *Steelworkers* trilogy that the arbitrator does not sit to "dispense his own brand of industrial jus-

77. Labor Management Relations Act § 203(d), 29 U.S.C. § 173(d) (1964).
78. Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957).
79. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 597 (1960).
80. Boys Markets v. Retail Clerks Union, Local 770, 389 U.S. 235 (1970).

tice."[81] Because this so limited the scope of the arbitrator's inquiry, the Fifth Circuit concluded that a full hearing necessitated relitigation in federal court.

The most significant evidence of the Court's position on the deference question is its treatment of the *Dewey* case, which was its only opportunity to address the issue. The case was affirmed by an equally divided Court.[82] Sifting through the dicta of the section 301 cases reveals, as the circuits have recognized, ammunition for both sides. The Court has stated:

> Arbitration is a stabilizing influence only as it serves as a vehicle for handling *any and all* disputes that arise under the agreement.[83]

This passage, while not cited in any of the deference cases, suggests that the Court would frown on a bifurcated settlement process where discrimination disputes were routinely absent from arbitration. Furthermore, the Court's characterization of labor arbitration as "at the very heart of the system of industrial self-government[84] suggests that factors having a delterious effect upon arbitration will likewise significantly disrupt national labor policy on a broad level.

In contrast, even stronger language limiting the arbitrator to the four corners of the collective bargaining agreement can be found in the *Enterprise Wheel* case than the passage which appeared in the *Hutchings* opinion. Commenting on the arbitrator's decision to award back pay beyond the expiration date of the agreement, which had expired during the arbitration, the Court said:

> It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission.[85]

Yet another case in the trilogy contains seemingly contradictory dicta:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equal-

81. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 581-82 (1960).
82. Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971).
84. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) (emphasis added).
85. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

> ly a part of the collective bargaining agreement although not expressed in it. . . .The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished.[86]

An attempt to reconcile these varying dicta seems not only doomed to failure, but also to be mere speculation in view of the manner in which *Dewey* split the Court. However, it would be a mistake to ignore the thrust of the section 301 cases: that labor arbitration has reached such a position of primacy as a tool of national labor policy as to justify abandonment of the prohibition against labor injunctions contained in the Norris-LaGuardia Act. The conclusion is inescapable that the solution most commensurate with the pronouncements of the Court is not an all-encompassing rule for or against deference, but rather a rule that maximizes the role of arbitration in the dispute settlement process by avoiding the injury to arbitration which may inhere in either extreme.

A test which determines, on a case-by-case basis, whether the arbitrator considered the evidence and issues necessary to a full hearing of the Title VII aspects of the grievance would preserve the maximum impact for arbitration on dispute settlements. Management could not object to the inclusion of a mandatory arbitration clause on the ground that the award would not bind the civil rights grievant. Conversely, grievants would have no reason to routinely avoid arbitration because they would be bound by the award only if it could be shown that their Title VII charges had received a full and fair hearing.

It must be emphasized that the impetus given to arbitration in the *Lincoln Mills* line of cases never exceeded the expectations of the parties. In each instance, the parties had contracted for the mandatory arbitration clause which was being enforced. A policy of deference built around criteria of a full and fair hearing would not frustrate this self-determination aspect of arbitration. If the parties believed relitigation to be in their best interests, they could insure that a court would not defer to an award issued under their collective bargaining agreement by expressly precluding the arbitrator from consideraing evidence on certain enumerated statutory issues. Such an award could not then ever meet the full and fair hearing criterion.

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86. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960).

D. THE GRIEVANT'S CONTROL OVER THE ARBITRATION PROCESS

The court in *Newman* gave considerable weight to the charge that the union had presented the employee's grievance in a perfunctory manner. The possibility that a judicial policy of deference might enshrine an award that has been contrived by the bargaining representative to the prejudice of the grievant has drawn harsh criticism from many commentators.

Illustrative of this difficulty is *Vaca v. Sipes*.[87] Plaintiff, a union member, sued the national and local unions under section 301 over an allegedly arbitrary refusal to carry his grievance to the final step of arbitration. In dictum, the Court conceded that an employee could seek judicial enforcement of his contractual rights where the union not only had sole power to invoke the higher steps of the grievance procedure, but also to deprive the employee of his contractual remedies by wrongfully refusing to process the grievance. In sharp contrast, the Court's treatment of the case on its merits showed little sympathy for the employee who had been bargained under the table by his union. In rejecting the contention that the employee had an absolute right to have his grievance taken to arbitration, the Court stated that the union would be found to have breached its duty of fair representation only upon a showing of arbitrary, discriminatory or bad faith conduct. The Court felt that any other result would so impinge upon the union's discretion to settle grievances short of arbitration that the grievance mechanism would collapse under the burden of carrying each and every dispute to arbitration. It stated:

> For if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial.[88]

The unarticulated concern is, of course, the hostility of the union to a member of a racial minority. Arbitrator Gould, writing in the Pennsylvania Law Review, alleges:

> In the case of discriminatory grievances, all of the factors indicate that the parties view minority group members as a

87. Vaca v. Sipes, 386 U.S. 171 (1967).
88. *Id.* at 192-93.

> disruptive intrusion into what might otherwise be a smooth-working bilateral arrangement.[89]

He continues his indictment of the racism present in the grievance mechanism by asserting:

> First, it is obvious that the aggrieved worker or group cannot expect to obtain an objective evaluation of the issue in dispute if the parties who are alleged to have discriminated have control of the grievance machinery. . . .
>
> Second, black workers are almost totally absent from positions of leadership in organized labor, even in unions where their numbers are high. . . .
>
> Third, . . . quite often the collective bargaining agreement does not support legitimate grievances asserted by protesting black workers.[90]

The issue of importation of federal law into a collective bargaining agreement by the arbitrator on his own initiative will be discussed in the following section of this paper. Nevertheless, the point of union bias against members of racial minorities cannot be denied.

Any standard that permits, even in a limited number of cases, the award of an arbitrator to bar a subsequent Title VII court action must provide criteria that exposes union-management collusion and perfunctory representation by the bargaining agent. The formulation of such a standard raises a collateral question concerning the resolution of the plight of the employee who alleges that his award is "final" only because his union wrongfully refused to press the grievance to the next step in the hierarchy. Initially it must be observed that the employee need not submit the grievance to arbitration; no case was found which required the exhaustion of contractual remedies as a condition precedent to bringing suit under Title VII.[91] *Dent v. St. Louis-San Francisco Ry. Co.*[92], where a Title VII action alleging racial discrimination was brought against both the employer and the union, is illustrative. The court held that the exhaustion requirement of *Republic Steel Corp. v. Maddox*[93] was in-

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89. Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. OF PA. L. REV. 40, 49 (1969) [hereinafter cited as *Gould*].

90. *Id.* at 46-47.

91. Such cases have not escaped criticism. *See, e.g.*, Bloch, *Race Discrimination in Industry and the Grievance Process*, 21 LAB. L. J. 627 (1970) (without an exhaustion requirement, uniform settlement routs are disruped).

92. Dent v. St. Louis-San Francisco Ry. Co., 265 F. Supp. 56 (N.D. Ala. 1967), *rev'd on other grounds*, 406 F.2d 399 (5th Cir. 1969).

93. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). There the court said, "A contrary rule . . . would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances." *Id.* at 653.

applicable. In reaching a similar result, the court in *Reese v. Atlantic Steel Company*[94] commented:

> The Act sets out specifically the procedures necessary for the institution of a civil action, and processing a grievance through the contractual machinery is not noted as such a condition precedent to a civil suit.[95]

Hence, it could be argued that the policy which these cases assert against exhaustion is not diminished because the grievant initiated the grievance machinery before he decided that a federal court was the more promising forum. Furthermore, it must be pointed out that the *ab initio* election rule has not found favor since it was pronounced by the lower court in the *Bowe* case. And in *Spann*, the Sixth Circuit emphasized the acceptance of a final award.

Alternatively, the grievant who aborts the settlement mechanism alleging bad faith representation by the bargaining agent may find some solace in the Supreme Court's partial retreat from its ruling in *Vaca*. In *Glover v. St. Louis-San Francisco Ry. Co.*[96] the plaintiffs sued both their employer and their union, alleging racially discriminatory denials of promotions. The defendants pointed to plaintiffs' failure to exhaust their contractual remedies, citing *Vaca* and *Maddox*. The Court found for the plaintiffs, stating:

> Here the complaint alleges in the clearest possible terms that a formal effort to pursue contractual or administrative remedies would be absolutely futile. Under these circumstances, the *attempt* to exhaust contractual remedies, required under *Maddox*, is easily satisfied by petitioners' repeated complaints to company and union officials, and no time-consuming formalities should be demanded of them.[97]

This language would support the argument that involvement at an early stage of the grievance settlement mechanism was no more than a necessary attempt by the grievant to ascertain the quality of represenation that the union was prepared to offer, and that having found such quality lacking, he should be permitted to withdraw without prejudice.

The preceding analysis is flawed in one respect: it fails to distinguish the grievant whose claim has never been fully adjudicated because of the union's wrongful refusal to press it to a higher level

94. Reese v. Atlantic Steel Co., 282 F. Supp. 905 (N.D. Ga. 1967); *see also* King v. Georgia Power Co., 295 F. Supp. 943 (N.D. Ga. 1968).
95. Reese v. Atlantic Steel Co., 282 F. Supp. 905, 906 (N.D. Ga. 1967).
96. Glover v. St. Louis-San Francisco Ry. Co., 393 U.S. 324 (1969).
97. *Id.* at 331.

from the grievant whose complaint lacks sufficient merit to warrant further prosecution but who now seeks to escape the finality of that determination through parallel relief in a federal court. This dilemma can be avoided either by requiring the grievant to prove the defect in the union's representation or requiring the party who urges the award as a bar to prove that the grievant had been fairly represented.

A comparison of the policies supporting fair employment with those behind labor arbitration suggests that the burden be placed on the party who urges the award as a bar. The Supreme Court described the former as, "a policy that Congress considered of the highest priority."[98] Gould has concluded that:

> While the national labor policy encouraging arbitration may properly incorporate an election of remedies theory, public policy against racial discrimination outweighs it.[99]

Furthermore, the grievant's burden of proving the representation to have been inadequate is the more weighty. The union, particularly with the cooperation of management, can easily lay a paper trail manifesting all the outward indicia of vigorous representation. The grievant has no control over the proceedings which would enable him to preserve a record of perfunctory representation. Conversely, the party who argues for an estoppel, be it union or management, can create a record that evidences the adequacy of the representation. For example, the grievant could be required to either assert or make a written waiver of his right to be represented by his own attorney. If he wishes to utilize the plant's grievance mechanisms, he should be required to acknowledge that he is accepting the union's efforts on his behalf and that he is aware of the possible operation of the award as an estoppel in a subsequent proceeding. The arbitrator could be requested to interrogate the grievant as to the latter's satisfaction with the quality of the union's representation, and the results of that inquiry could be made a part of the award.

Finally, in so far as the estoppel effect of an award will presumably benefit the employer, forcing the employer to prove the adequacy of the union's representation should minimize any collusion between the two. Management should cooperate fully under a procedure that permits it to lay a basis for the subsequent assertion of an award as an estoppel.

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98. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-02 (1968).
99. Gould, *supra* note 89, at 57.

IV. THE APPLICATION OF LAW EXTRANEOUS TO THE AGREEMENT BY THE ARBITRATOR

As has been previously noted, the court in the *Newman* case refused to hold that the arbitration award estopped further proceedings because of its concern that, in the absence of an anti-discrimination clause, the arbitrator may have considered himself restricted to the agreement and he may have ignored the impact of Title VII on the employer's conduct. Hence, a standard for determining judicial deference to an arbitration award must show that the arbitrator applied federal civil rights law in approximately the same manner that it would be applied by a federal court in a Title VII suit.

Where the terms of the agreement leave no doubt that the parties intended grievances to be settled in light of pertinent federal law, most arbitrators would feel compelled to acquiesce in the wishes of the parties. Where, however, the agreement provides no basis for the incorporation of federal law, the arbitrator must choose between venturing beyond the four corners of the contract and issuing an award which will permit, if not compel, the parties to seek additional relief in another forum.

Although the suggestion has been made that an agreement which does not expressly recognize Title VII rights automatically precludes deference to an award issued thereunder, it is submitted that such a standard would unnecessarily constrain judicial deference, possible to the detriment of the arbitration process. To reiterate, the party who urges the award as an estoppel must prove the adequacy of the hearing. Where the contract was silent on Title VII rights, the burden would include proof not only that the legal issues were considered by the arbitrator, but that sufficient evidence on them had been introduced to insure a full hearing. The former should allow for arbitral reticence; the latter for bargaining agent under-representation. But where both have been met, it is submitted that for purposes of barring relitigation, the award stands on equal footing with an award entered under a contract containing an anti-discrimination provision.

The subsequent materials examine the validity of this assertion in view of the arbitrators' attitudes toward the application of extraneous law.

A. AWARDS THAT FAVOR THE INCORPORATION OF EXTRANEOUS LAW

A standard which finds support among both arbitrators who favor activism and those who favor constraint is the clarity of

the legal issue involved. The case of *Toledo Board of Education*[100] is illustratrative. There the arbitrator was forced to decide whether, absent express legislative authorization, a school board could enter into collective bargaining agreements with representatives of its employees. The arbitrator stated:

> It is the conviction of the arbitrator that where there is *clear and well defined law,* whether it be constitutional, statutory, ordinance or case law, that is involved in determining an issue before him, he should apply the law in reaching his decision.[101]

Arbitrator Walsh then pushed the "clarity" standard to its limits. After acknowledging that courts had split over the issue, he upheld the power based on the board's authority to enter into and terminate contracts with teachers. Similarly, in *Pennsylvania Electric Company*[102] the arbitrator had to define "time worked" in order to ascertain the propriety of awarding travel pay to employees who participated in a training program. Arbitrator Stein held:

> [S]o far as statutory meanings can be ascertained with confidence as to their accuracy, they should be resorted to in defining those terms of the collective bargaining agreement whose ultimate meaning and application are controlled by the statute.[103]

Apparently because of the authoritativeness of a statutory definition, its inclusion in the arbitration process is highly favored. In *Associated General Contractors*[104] arbitrator Regester conceded that the intent of the parties would prevail over a statute, but added that where a contract was silent on the meaning of a term, a state or federal statute was relevant.

Finally, the standard of clarity may also apply to the violation. In *Alsco Incorporated*[105] discharged female employees claimed jobs held by male employees junior to them in seniority, but state law, which had been upheld by the EEOC, restricted those jobs to males. Although the contract made no mention of the state law, Arbitrator Altrock found it to be controlling. He characterized arbitration as a private procedure to which the state was not a party, but nonetheless concluded:

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100. Toledo Board of Education, 70-1 ARB P 8113 (Walsh 1969).
101. *Id.* at 3393 (emphasis added).
102. Pennsylvania Electric Co., 66-3 ARB P 8842 (Stein 1966).
103. *Id.* at 5913.
104. Associated General Contractors, 66-3 ARB P 8973 (Regester 1966).
105. Alsco, Inc., 67-2 ARB P 8364 (Altrock 1967).

> [A]ll applicable law must be considered as implicitly and inferentially a part of a compact between entities existing within and doing business under the dominion and sovereignty of a State. . . . The labor agreement might contain a provision that the minimum hourly wage rate will be 73c. Surely no one would contend that the statutory minimum is a dead letter because in conflict with the will of the contracting parties.[106]

While to the activist arbitrator the intent of the parties may not preclude his consideration of pertinent law, he may rely on the parties' intent to broaden the scope of his inquiry. *Weirton Steel Company*[107] involved discrimination against female employees in favor of male employees who were their juniors in seniority. Arbitrator Kates observed that, in 1965, the term "sex" had been added to the contract's anti-discrimination provision. On this basis he concluded:

> [B]ecause I consider that the 1965 anti-discrimination amendment to the labor agreement was made as a result of the new federal law and in light thereof, I hold that I may properly refer to that law and any regulations or decisions thereunder in an attempt to ascertain the intent of the parties under the new contract language.[108]

Where the collective bargaining agreement does not contain an anti-discrimination provision, authority to arbitrate a racial grievance has been found by implication in its other terms. In *National Lead Co.*[109] the absence of an anti-discrimination clause did not prevent arbitrator Wissner from hearing a charge of racial discrimination. He reasoned:

> Clearly, the arbitration clause ["Should any grievance arise under this agreement . . . ."] as stated in the contract is very broad. Since the grievance as filed raises the question of qualifications to do the job as well as the issue of race, [it is arbitrable].[110]

Arbitrator Howlett, an outspoken activist, justified his reliance on federal law which was extraneous to the contract by reference to the parties' conduct during the hearing. He explained his accep-

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106. *Id.* at 4308.
107. Wenton Steel Co., 68-2 ARB P 8492 (Kates 1968).
108. *Id.* at 4687.
109. National Lead Co., 48 LA 105 (Wissner 1967).
110. *Id.* at 407. *See also* Platt, *The Relationship Between Arbitration and Title VII of the Civil Rights Act of* 1964, 3 GA. L. REV. 398 (1969), "[I]n the absence of specific evidence that the parties intended a different result. [I]t would be possible for an arbitrator to rely upon Title VII as a source of interpreting what constitutes 'just cause.'" *Id.* at 405.

tance of the union's contention that Title VII had preempted state law limiations on the amount of overtime which female employees could work in these words:

> As Simoniz and local 559 have argued in their presentations the legality of management's refusal to recognize grievants' bid, I am of the opinion that, as arbitrator, I should apply the law.[111]

In another case, Arbitrator Howlett applied a state fair employment law without contractual authority. He characterized the issue of civil rights as one of rising importance, and, citing the Fair Labor Standards Act, expressed the view that "An award which does not consider the law may result in error."[112]

Another strong argument on behalf of arbitral activism is voiced in *Pennsylvania Electric Co.*[113] The arbitrator relied upon a statute to define a contract term, stating:

> It seems to me improper and incorrect to define terms in a manner plainly inconsistent with the overriding legal definition, saying to the parties that what is as a matter of law invalid is proper and correct under the collective bargaining agreement, *thus necessitating recourse to administrative agencies and the courts . . . .*[114]

Surprisingly, no other award that incorporated extrinsic law articulated this rationale.

The breadth of an activist arbitrator's exploration of extrinsic law is illustrated in *Manchester Gas Co.*[115] The grievant, who was not a United States citizen, had been hired despite a contract provision which required all employees to be citizens. The union attempted to enforce the contract. Arbitrator Hagan first pointed out that, insofar as federal court enforcement of private agreements was subject to the limitation of public policy, arbitral enforcement of such agreements should be similarly limited. He then acknowledged the union's contention that the Fifth and Fourteenth Amendements necessitated state action, but upheld the hiring based on the immigration policy of the United States.

This survey has ignored awards which apply extraneous law based only upon a conclusory rationale, such as the arbitrator's

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111. Simoniz Co., 70-1 ARB P 8024, at 3097 (Howlett 1969).
112. Warren Consol. Schools, 67-1 ARB P 8228 (Howlett 1967).
113. Pennsylvania Electric Co., 66-3 ARB P 8842 (Stein 1966).
114. *Id.* at 5913 (emphasis added).
115. Manchester Gas Co., 53 LA 329 (Hagan 1969).

concept of his duty.[116] They contribute nothing to an attempt to determine the propriety of arbitral reliance upon federal law in general and Title VII in particular where the agreement provides no support for such reliance. Within the context of the search for standards, the clarity of the law test has some attraction. Few policies have received the amount of attention from all three branches of the national government as has equality of employment opportunities. Furthermore, the burgeoning volume of both judicial and administrative litigation of Title VII claims has built a vast repository of rulings that are available to the arbitrator in his determination of the lawfulness of an employment practice. However, precedent can so operate only if arbitrators are assumed to possess the expertise to comprehend the nuances which lurk in the interstices of the opinions. This matter of arbitral competence is considered in a subsequent section.

The remaining reasons set forth on behalf of arbitral activism are of little value in the formulation of a standard for arbitral application of extraneous law. For example, Arbitrator Howlett's suggestion that he could consider an issue because the parties had argued it, regardless of their desire that the issue not be arbitrated, bespeaks of the bootstrap. Once an objecting party has lost on a jurisdictional objection, he has no other real choice. Similarly, any reading of an arbitration clause to embrace Title VII issues, where, despite the extensive publicity given to equal employment problems, the contract contains no express reference to employment discrimination, seems to be at best strained. In the same vein are arguments which analogize arbitration to judicial proceedings, or bemoan the necessity of forcing the parties into another forum. The former assumes the conclusion, that arbitration can be equated to judicial proceedings; the latter assumes that the alternative forum is not the more appropriate.

In summary, arbitration awards that incorporate extraneous law evidence a vigorous spirit of arbitral activism. However, with the exception of the clarity standard, the varying rationales advanced neither dispose of the general propriety of such activism nor are especially applicable to the unique body of federal civil rights law.

B. AWARDS THAT OPPOSE THE INCORPORATION OF EXTRANEOUS LAW

Many of the expressions of constraint concerning the application of law which is extraneous to the contract turn to the contract for

116. *See, e.g.*, Avco Lycoming Div., 70-1 ARB P 8400 (Turkus 1970) (Title VII held to prevail over state law limitations on overtime hours for female employees).

support. *Western Airlines*[117] is illustrative. There a stewardess alleged that her discharge because of pregnancy violated her Title VII rights. Noting that the discharge for pregnancy clause had been in the contract that the grievant had signed, the Adjustment Board stated:

> We are a creature of the contract with our jurisdiction or authority limited by the terms of the Agreement which deprives us of jurisdiction or authority to make changes in working conditions covered by the Collective Bargaining Agreement.[118]

Similarly, where an arbitration board was asked to determine whether a strike had been lawful under the Railway Labor Act, it responded:

> This Board is not empowered to interpret or apply the Railway Labor Act. It is empowered to interpret and apply the contract.[119]

Reliance on the contract may involve as incisive an analysis of its language as that employed by the activist arbitrators. In *Eaton Manufacturing Co.*[120] female employees, regardless of their seniority, were effectively prevented from bumping male employees because they were assigned to the lowest rated jobs. Although Arbitrator Kates acknowledged that Title VII was in direct conflict with the job assignment provisions of the contract, he concluded that the following arbitration clause precluded reference to extraneous law:

> Should any employee feel that he has been unjustly dealt with *under the terms of this Agreement or the provisions of this agreement violated,* every effort shall be made to settle the grievance in the following manner. . . .
> In the event that the matter has not been satisfactorily adjusted, the party desiring to submit the grievance *involving interpretation of the contract* to arbitration shall so notify the other party in writing.[121]

Arbitrator Seinsheimer, when faced with a conflict between allegations of sexual discrimination and countercharges that female employees could not perform the heavy work which was in dispute,

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117. Western Airlines, 70-1 ARB P 8367 (Wyckoff 1970).
118. *Id.* at 5023.
119. Western Airlines, 71-1 ARB P 8115, at 3389 (Meiners 1970).
120. Eaton Mfg. Co., 47 LA 1045 (Kates 1966).
121. *Id.* at 1050. *But see* National Lead Co., 48 LA 105 (Wissner 1967).

denied the claim on the grounds that the parties had not intended to contract for an anti-discrimination clause:

> While at first it appears that the parties did not seem to become aware of the Civil Rights Act of 1964 until early in 1966, I am sure that the parties have had access to publications and publicity concerning the Act, and I, therefore, must assume that the 1965 contract was negotiated with knowledge of this law, and that the past practice separating male and female jobs was continued also with knowledge of this aforementioned Equal Employment Opportunity Act. Therefore, I must also assume that the parties continued their practice as they must have agreed that here *was* a difference in certain jobs, and that certain jobs required male occupancy.[122]

Insofar as the impact of fair employment legislation is becoming more widely publicized with the passage of time, this argument is more potent now than it was when the award was made.

The non-activist arbitrators have applied a presumption of validity to the contract to escape reconciling any conflict with pertinent but extraneous law. In *The Ingraham Co.*[123] the parties had adopted a contract creating separate male and female seniority lists shortly before the passage of Title VII. A female employee challenged the separate seniority. Arbitrator Yagoda dismissed the claim, stating:

> [T]he Collective Bargaining Agreement is the joint product of both parties. The arbitration mechanism created by the parties to interpret and apply their commitments as expressed in the Collective Bargaining Agreement must act on a presumption of validity of said Agreement.[124]

A like result was reached in *United Air Lines.*[125] There the arbitrator refused to void a rule which resulted in the discharge of stewardesses who married. He reasoned that until the EEOC had passed on the consistency of the rule with Title VII, the rule carried a presumption of validity.

The best-reasoned justification for arbitral abstention focuses on the superior expertise of the agencies who are charged with the enforcement of fair employment legislation. *Phillips Petroleum Company*[126] exemplifies this analysis. A female employee alleged that repeated denials of admission to a training program were dis-

122. Pittman-Moore Div., 49 LA 709, 718 (Seinsheimre 1967).
123. The Ingraham Co., 48 LA 884 (Yagoda 1966).
124. *Id.* at 889.
125. United Airlines, 67-1 ARB P 8207 (Kahn 1967).
126. Phillips Petroleum Co., 68-2 ARB P 8521 (Allen 1968).

criminatory. Although the contract prohibited sex discrimination, it also placed the training program within the discretion of management. Arbitrator Allen cautioned against the substitution of arbitration for the statutory procedures which implement the law in these words:

> The arbitrator is not the Missouri Commission on Human Rights and should not substitute himself in its place in terms of rights or ability to enforce the law which the Commission administers.[127]

The arbitrator limited his inquiry to the question of whether the grievant had been the victim of sexual discrimination. Notably, he specifically refused to consider whether the company's overall record was suggestive of discrimination based on sex because, "The latter point would be infringing on the authority and power of the Missouri Commission on Human Rights."[128]

A similar discussion appears in *The Ingraham Co.*[129] Although conceding that an arbitrator should resist upholding illegal contract provisions, Arbitrator Yagoda warned against arbitrators, "substituting themselves for the authority, expertise and procedures which have been established by and are responsive to the statute in implementing the law."[130] He continued that the arbitrator was not the EEOC, and should not put himself in its place.

In summary, the emphasis on the contract as a barometer which, by its silence, precludes the incorporation of extraneous law is conclusory rather than analytical. Such expressions beg the question by assuming that the parties are empowered to exclude federal law pertinent to the grievance being arbitrated. As with the awards of the activist arbitrators, the pronouncements of the non-activists discloses only one argument which is persuasive: arbitral competence. The arbitrator who settles a grievance that presents complexities which are beyond his comprehension does both the parties and the very process a two-fold disservice. Not only is the likelihood of a correct determination unlikely to rise above the level dictated by chance, but, more crucially, because the award shows an attempt to grapple with the issues, a court may be led to uphold it as a bar to relitigation of the discriminatory practice.

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127. *Id.* at 4797.
128. *Id.*
129. The Ingraham Co., 48 LA 884 (Yagoda 1966).
130. *Id.* at 889. Arbitrator Yagoda considers the EEOC to have preempted the field, and terms arbitration a "futile act." *But cf.* National Lead Co., 48 LA 105 (Wissner 1967), wherein Arbitrator Wissner states, "If an employee exercises a right under a statute, the exercising of such a right does not preclude him from having a grievance filed under a labor contract heard by an arbitrator." *Id.* at 407.

Two suggestions can profitably be drawn from the non-activists concern over arbitral competence. First, doubt as to his own ability to resolve a legal issue is an adequate ground for arbitral abstention. The arbitrator who so decides should inform the parties that he is limiting the scope of his inquiry. If this warning comes early enough, the parties might agree to excuse the arbitrator in the hope that his replacement would settle the dispute in its entirety. Alternatively, the parties would at least be prepared for relitigation because of the arbitrator's failure to recognize the legal issue.

Second, where the parties suspect that the complexity of the grievance will force the arbitrator to the frontiers of his expertise, they should specifically set forth the legal questions in their briefs with the request that the arbitrator give detailed consideration to such questions in his award. Thereby, the parties might persuade the arbitrator who has doubts about his facility in matters legal to expressly disclaim consideration of certain issues. In addition, if the arbitrator who has doubts about his facility in legal matters to the award of issues which he did not understand should convince a reviewing court of the absence of a full hearing, which would preclude the finding of an estoppel. As to the party who wishes to lay the basis for an estoppel in arbitration, a detailed discussion that demonstrates the arbitrator's comprehension of the legal issues should persuade the reviewing court that the full hearing requirement has been satisfied.

C. THE POSITION OF THE COMMENTATORS ON THE APPLICATION OF EXTRANEOUS LAW

A theory of judicial deference to arbitration awards that purport to determine Title VII rights is predicated upon the dual assumptions that, in at least some discriminatory employment grievances, arbitrators can and should apply pertinent federal statutes. Both assumptions have been strenuously attacked. Arbitrator Meltzer precipitated a deluge of commentary when, at the 1967 annual meeting of the National Academy of Arbitrators, he urged the following solution for the grievance that rests upon law foreign to the parties' agreement:

> Where, however, there is an irrepressable conflict, the arbitrator, in my opinion, should respect the agreement and ignore the law.[131]

131. Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, THE ARBITRATOR, THE NLRB AND THE COURTS 16 (1967).

He was unperturbed by the fact that while courts measure awards against the agreement, arbitrators were denied the responsibility of measuring agreements against the law. The practice, in his opinion, was no more than "in each case, to confer responsibility that reflects the different functions being performed and the different presuppositions about the competence of the different tribunals."[132]

As was illustrated by some of the non-activist awards previously discussed, many arbitrators justify a policy of ignoring law which is extraneous to the agreement by asserting an obligation to uphold the intent of the parties. In addressing the 1968 meeting of the Academy, Arbitrator Mittenthal stated:

> The very fact that the parties take the trouble to specify the areas in which the law is to effect their relationship suggests that they do not intend to be bound by statutory obligations not mentioned in the contract. The typical narrow arbitration clause also serves to inhibit any importation of the law into the contract.[133]

He also emphasized judicial pronouncements on the relationship between law and contract, disputing their apparent support of the activist position. For example, in 1866 the Supreme Court stated:

> [T]he laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of [the contract], as if they were expressly referred to or incorporated in its terms.[134]

Mittenthal observed that judges first interpret a contract, and thereafter determine its legal operation; he argued that only in the latter task is relevant law applied. More persuasively, he quoted both Williston and Corbin as opposing the doctrine. "Indeed, Corbin flatly asserts that 'statutes and rules of law are certainly not incorporated into the contract'."[135] Finally, Mittenthal contended that courts apply law to a contract because they exercise the coercive power of the state; he distinguished arbitrators as exercising no such power.

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132. *Id.* at 19.

133. Mittenthal, *The Role of Law in Labor Arbitration*, DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION 42, 52 (1968). *But cf.* U.S. Steel Corp., 48 LA 1114 (1967) where, in disposing of a theft case, Arbitrator Mittenthal initiates a suspiciously judicial inquiry into state of mind, intent, admissions by the accused, and the weight of the evidence.

134. Van Huffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 550 (1866). *See, e.g.*, Adams v. Spillyards, 187 Ark. 641, 61 S.W.2d 686 (1933); Industrial Accident Comm'n. of Colorado v. Aetna Life Ins. Co., 64 Colo. 480, 174 P. 589 (1918) (citations by Mittenthal).

135. Mittenthal, *supra* note 133.

The extremity of the Mittenthal view is shown by his analysis of national labor policy, oft-cited as a source of support for arbitral activism. He not only asserts that national labor policy does not support the implication that law is part of the contract, but continues:

> Moreover, because we serve the parties and not the public, I doubt that national labor policy could in any event be a sound basis for drawing this implication.[136]

These arguments have not passed without criticism. Arbitrator Howlett, addressing the same proceeding, contested the interpretation of the language from *Enterprise Wheel* cited by the court in *Hutchings* that the arbitrator is limited to the collective bargaining agreement:

> [I]t does not mean that an arbitrator may not, or should not, apply the law. Quite the contrary! The arbitrator interprets and applies the collective bargaining agreement within the law. He may *believe* that men and women *should not* be equal in pay and other economic benefits, but the law is to the contrary—and ought to be applied regardless of the contract language.[137]

Howlett, having the last word advantage over Mittenthal, also quarrels with the conclusion that only courts apply the coercive power of the state. Citing the *Lincoln Mills* case he asserts:

> Arbitrators also participate in the coercive power of the state, as both federal and state law provide for enforcement of arbitrators' awards by courts of competent jurisdiction.[138]

An analysis which disputed the dependence of arbitration on the intent of the parties was presented to the Academy in 1970.[139] Arbitrator Sovern relied on *John Wiley & Sons v. Livingston*,[140] where a union attempted to enforce a collective bargaining agreement against Wiley, which had absorbed the company who had negotiated the contract with the union. In an opinion which found for the union, Mr. Justice Harlan explained:

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136. Mittenthal, *supra* note 133, at 54.

137. Howlett, *The Role of Law in Arbitration: a Reprise*, DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION 64, 67 (1968).

138. *Id.* at 69.

139. Sovern, *When Should Arbitrators Follow Federal Law?* ARBITRATION AND THE EXPANDING ROLE OF NEUTRALS 29 (1970).

140. John Wiley & Sons v. Livingston, 376 U.S. 543 (1964).

> While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. . . . Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated by both circumstances. . .and by the requirements of the National Labor Relations Act, that *it is not in any real sense the simple product of a consensual relationship.* Therefore, although the duty to arbitrate. . .must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed.[141]

Two additional arguments have been voiced on behalf of arbitral activism. First, the cost of arbitration cannot be ignored. Where, because the arbitrator refuses to consider legal issues that are central to the grievance, the controversy must be relitigated, the expense of the first hearing being essentially wasted. In rebuttal, it could be argued that merely because the arbitrator considers the issue is no insurance that it will not be relitigated. However, in response to a poll of all the members of the Academy, sixty per cent felt that interpretation of a legal question involved in a dispute would limit the length of litigation between the parties; only fourteen per cent felt that it would not.[142] Secondly, Arbitrator Howlett argues that where arbitrators refrain from grappling with legal issues, they not only deny the Board the benefit of their expertise when the same issue appears before it, but also frustrate the Board's policy in *Speilberg.*

The possibility that arbitrators lack the competence to apply fair employment laws to a grievance remains the most significant objection to the incorporation of such extraneous law. Meltzer has observed:

> There is, moreover, no reason to credit arbitrators with any competence, let alone special expertise with respect to the law, as distinguished from the agreement. A good many arbitrators lack any legal training at all, and even lawyer arbitrators do not necessarily hold themselves out as knowledgable about the broad range of statutory and administrative materials that may be relevant in labor arbitration.[143]

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141. *Id.* at 550 (emphasis added).

142. Note, *The Authority and Obligation of a Labor Arbitrator to Modify or Eliminate a Provision of a Collective Bargaining Agreement Because in His Opinion It Violates Federal Law,* 32 OHIO ST. L.J. 395 (1971). The questionnaires were mailed to all members of the Academy. However, because the arbitrators responded at will, the results are not truly random.

143. Meltzer, *supra* note 131, at 16.

This contention is born out by the responses of the members of the Academy to the following question:

> Assuming you were authorized to do so, how would you feel about interpreting the provisions of a collective agreement in accordance with the following statutes. (1) Would feel competent and expert; (2) Would feel competent; (3) Would rather avoid; (4) No opinion.[144]

For Title VII of the Civil Rights Act the following responses were returned by non-lawyer and lawyer arbitrators, respectively:

(1)	(2)	(3)	(4)
18%	47%	31%	4%
23%	58%	13%	6%

In comparison with the other ten statutes that were presented, only the federal anti-trust laws and the Welfare and Pension Plans Disclosure Act received lower ratings in the first category. In the second category, however, Title VII ranked highest.

Even those who advocate judicial deference to arbitration awards concede the complexities of employment discrimination. Bloch, who harshly criticized the cases that abrogated the exhaustion of contractual remedies rule for Title VII grievances, states:

> Racial discrimination comes in many forms, some so subtle that even the most experienced arbitrator may be unable to define the situation. . . . This is the fundamental reason for the existence of expert administrative agencies. . . . Moreover, since the arbitrator is probably not trained in labor and civil rights law, the potential for error increases.[145]

In an article which compliments arbitrators for their handling of discrimination policies of the nation they tend to beg off."[147]

> Where the arbitrators deal with the cases which are the grist for the arbitration process; the promotion denied, the

144. Note, *supra* note 142, at 398.

145. Bloch, *supra* note 91, at 638. Bloch attempts to mitigate this criticism by arguing that the arbitrator is competent to operate within the four corners of the agreement. This leads to the rather anomolous result that the intent of the parties determines not only the arbitrator's jurisdiction, but also his competence.

146. Blumrosen, *Labor Arbitration, EEOC Conciliation, and Discrimination in Employment*, 24 ARB. J. 88, 90 (1970).

147. *Id.* at 92. The author finds comfort in Sligo, Inc., 50 LA 1203 (1968), where Arbitrator Dunsford upheld time off for black employees to mour the assassination of Dr. Martin Luther King, while white employees received no such opportunity.

> lay-off or discharge protested, the working conditions challenged, their opinions are respectable and workmanlike.[146]

Yet, the same author later acknowledges that, "[W]hen arbitrators are asked to go beyond this point in implementing the anti-discrimination policies of the nation they tend to beg off.[147]

The classic example of arbitration gone awry in the Civil Rights area is *Hotel Employers Assn.*[148] Under the threat of continuing demonstrations, which had already disrupted the San Francisco Hilton, the Association negotiated an agreement with the NAACP and CORE in San Francisco. Its purpose was to increase the proportion of minority hotel employees; its method was a system of beneficient quotas. In addition to finding that the Association had wrongfully bypassed the certified bargaining agent, Arbitrator Burns held:

> The purpose and effect of the 1966 Civil Rights agreement are to establish a preference for Negroes and other minority groups. . .and thereby to discriminate against non-Negroes and those who do not belong to some minority group. The purpose and effect are unlawful. Discrimination against any individual. . .because of race. . .is unlawful under federal law. . . .[149]

Arbitrator Burns further showed an unregenerate insensitivity to racial discrimination by ruling that a statistical analysis of minority employees by job classification was irrelevant unless used to establish an unlawful preference for minority workers. Such a ruling would surprise the EEOC, which frequently requires such statistics. Appropriately, Platt concludes:

> The lesson to be learned from *Hotel Employers Assn.*, it seems to me, is that there is a potential for miscalculation whenever an arbitrator undertakes to decide doubtful legal questions under Title VII instead of leaving them to the determination of EEOC and the courts.[150]

The loss to the grievant through an award which, in addition to being erroneous, is likely to estop further proceedings because the arbitrator heard evidence on all the legal issues, but floundered due to his lack of expertise, would be permanent. Furthermore, a result which strikes at the very process of arbitration has been suggested by Meltzer, in a response to the Mittenthal paper:

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148. Hotel Employees Assn., 47 LA 873 (Burns 1966).
149. *Id.* at 886.
150. Platt, *supra* note 110, at 409.

> Even if distinguished lawyer-arbitrators were selected to resolve grievances enmeshed with such matters [Title VII] and chose to speak about them, it is doubtful that they would have the last word in genuinely difficult cases. Reversal of their determinations, despite their asserted competence to make them, would, I believe, be more demeaning to arbitration than the invalidation of awards on the basis of legal considerations that arbitrators consider to be beyond their proper sphere. Furthermore, with respect to such legal issues, judicial review would exceed the limitations appropriate for arbitral determination on the scope of the agreement. Once habituated to comprehensive review, the courts might be less inclined to self-limitation in the contractual sphere.[151]

This survey of secondary authority in labor arbitration has demonstrated, as did the preceding review of the awards themselves, a split over the propriety of arbitral application of law pertinent to the grievance but extraneous to the agreement. The commentators clash primarily over the role that the intent of the parties should play in the exclusion of extraneous law. The equal number of authorities on each side and the inability of either camp to cite any court decision overturning an award because the arbitrator applied, or failed to apply extraneous law, make it unlikely that any solution will ever be drawn from such an amorphous concept as the intent of the parties.

No argument voiced by the commentators is either dispositive of the broad question of the incorporation of extraneous law, or especially applicable to the more particular issue of the incorporation of Title VII concepts. What clearly appears is a significant number of arbitrators, although probably still a minority, who will consistently apply pertinent law irrespective of the absence of express contractual authority. Because of the frequently articulated concern over arbitral competence in legal matters, any standard of judicial deference must limit the possibility of basing an estoppel on an award where an arbitrator settled legal issues that he did not fully comprehend.

In light of the Ohio State Law Journal poll, it cannot be doubted that a significant number of arbitrators feel they lack the expertise to perceive Title VII violations that might lurk in the interstices of a complex grievance. It is submitted, however, that this fact neither compels the conclusion that arbitrators should uniformly refuse to decide legal issues nor that courts should automatically allow relitigation because of the possible incompetance of the arbi-

151. Meltzer, *The Role of Law in Arbitration: Rejoinder*, DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION 58, 63 (1968).

trator. The growing number of agreements that contain anti-discrimination provisions[152] suggests that some arbitrators possess, and others are acquiring, the requisite expertise in the handling of fair employment practice grievances. Furthermore, the person most familiar with the shortcomings of an arbitrator is that arbitrator himself; the likelihood of voluntary abstention is considerable.

What is required is a warning to arbitrators, and a standard for courts, that arbitral competence is a crucial factor in determining whether an award will estop subsequent proceedings. As has been suggested, the parties should, as early as their submission, appraise the arbitrator of their concern over the complexity of the legal issues, and request that the award contain a full exposition of the legal issues, and request that the award contain a full exposition of the issues that he considered. The latter request would be similar to that submitted by parties when they anticipate that the award will have significant precedential value in future interpretations of their contract. Such a submission might crystalize an arbitrator's reticence into an express disclaimer on legal issues. If not, the requested exposition should provide a reviewing court with ample evidence of the arbitrator's competence or lack thereof from which to infer whether or not the Title VII issues had received a full hearing.

V. CONCLUSION

This note has examined the question of whether, and if so under what circumstances, the arbitration of a grievance to final settlement will bar a suit on the same facts brought in federal court under Title VII of the Civil Rights Act of 1964. The United States Courts of Appeals have split over this question. The Supreme Court has not resolved the conflict.

No definitive answer was found among the arguments voiced by the courts that have considered the deference issue. The decisions of the NLRB in analogous concurrent jurisdiction cases provide no support for a blanket rule either favoring or opposing deference. The Board's requirement that the party who asserts arbitration as a bar must prove that the arbitrator considered the same issues on which the Board would have based its ruling provides some

152. Platt, *supra* note 110, quotes the agreement between Bethlehem Steel and the United Steelworkers:

> It is the continuing policy of the Company and the Union that the provisions of this Agreement shall be applied to all employees without regard to race, color, religious creed, national origin or sex. The representatives of the Union and the Company in all steps of the grievance procedure and in all dealings between the parties shall comply with this provision.

Id. at 400, n.16.

guidance. A comparison of the remedies available in arbitration with those statutorily provided for judicial enforcement of Title VII disclosed substantial similarity.

Supreme Court cases on the arbitration process, particularly the *Steelworkers* trilrogy, include *dicta* which support both sides of the controversy. Yet the result of that litigation, that the arbitration process prevailed over the anti-injunction provisions of the Norris-LaGuardia Act, would at least indicate the desirability of a solution that maximizes the role of arbitration in national labor policy. Finally, the control exercised by the bargaining representative over the processing of a grievance cautions against presuming the fairness of the grievance procedure, particularly in light of probable union hostility toward minority group members.

The propriety of arbitral application of law extraneous to the collective bargaining agreement has been considered. Again, the awards diverged on this issue. No dispositive argument was discovered among either the awards or the commentaries. However, the extent of concern over the competence of many arbitrators to accurately apply extraneous law is uncontrovertable.

The formulation of a set of standards for controlling judicial deference to arbitration in the context of a Title VII suit has been accomplished by Edwards and Kaplan:

> (1) the arbitration hearing has been fair and regular;
> (2) the union, employer and employee would otherwise be bound by the decision of the arbitrator under the applicable collective bargaining contract;
> (3) the employee has voluntarily participated in the arbitration proceeding—that is, the employee has not resisted the union's efforts on his behalf;
> (4) the employee has been appraised by the union that a decision by the arbitrator adverse to his claim may subsequently foreclose relief under Title VII;
> (5) the employee has been fairly and adequately represented;
> (6) the arbitrator has found that the contract proscribes discrimination as defined by Title VII;
> (7) the arbitrator has considered and fully decided the charge of discrimination under the applicable anti-discrimination clause;
> (8) the employee has been given the option of using his own counsel to present his case to the arbitrator; and
> (9) the arbitrator's decision is not clearly repugnant to the purposes and policies of Title VII.[153]

153. Edwards and Kaplan, *supra* note 52, at 651.

The analysis in this paper has served more to confirm than to dispute these criteria, and is indebted to the authors for its overall organization. However, two exceptions must be taken.

First, the interest in arbitration as the preferred vehicle for dispute settlement does not wane because the contract fails to contain a clause which prohibits discrimination. Hence, where the arbitrator clearly states that he is going beyond the agreement to apply state and federal fair employment law, relitigation should not be permitted merely because the contract terms did not themselves secure Title VII rights. Secondly, even where the contract contains an anti-discrimination provision, and especially where it does not, some demonstration of arbitral competence to comprehend and adjudicate the Title VII rights should appear in the award as a condition precedent to the finding of an estoppel. Minimally, the award should include a full exposition of the legal issues from which a court could readily infer the quality, or lack of quality, of the arbitrator's analysis.

In conclusion, the endorsement of labor arbitration by the Supreme Court, which culminated in *Boys Market*, must be reiterated. The possibility of relitigating grievances which involve Title VII issues presents a significant threat to the continued vitality of that process. Gould has expressed this sentiment as follows:

> Arbitration is an established part of the collective bargaining process. It is vital to insure it is a sound one. New approaches to the use of arbitration in grievances involving racial discrimination are needed. For if racial discrimination cases cannot be heard by arbitrators, the uniformity to which *Vaca* has given honor and consideration will be undermined by a dual system composed of public and private routes—the first for racial cases and the second for non-racial.[154]

It is urged that the arbitration process once again needs the support of the Supreme Court. The Court should grant *certiorari* at its earliest opportunity in a case that presents the deference issue. The Court, in its opinion, should reach beyond the solution of the controversy to establish a clear set of standards that will insure, at least in a limited set of circumstances, that final settlement in arbiration of a grievance which involves Title VII rights cannot be relitigated through a federal court suit under the Civil Rights Act.

JOHN R. WEBB*

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154. Gould, *supra* note 89, at 50.

* Third year student, University of Colorado School of Law. The author gratefully acknowledges the criticism and assistance of Dean Don W. Sears, University of Colorado School of Law.